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No. 87-1167

In the Supreme Court of the United States

OCTOBER TERM, 1987

PRICE WATERHOUSE, PETITIONER

v.

ANN B. HOPKINS, RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

In this case petitioner Price Waterhouse was held to have violated Title VII of the Civil Rights Act of 1964 because of its decision not to make respondent Hopkins a partner in the firm. Although Price Waterhouse was held to have established a legitimate, nondiscriminatory, nonpretextual reason for that decision, the court of appeals characterized the case as one involving "mixed motives" for the employment decision because the firm's decisionmaking process included some unconscious and unquantifiable measure of impermissible "sex stereotyping." The court of appeals held, 2-1, that in such a "mixed motive" case the plaintiff prevails unless the defendant shows—and shows by clear and convincing evidence—that impermissible bias was not a decisive cause of the employment decision.

The question presented is whether the court of appeals was in error in shifting the burden of persuasion on the issue of intentional discrimination to the defendant, and in defining that burden in accordance with the "clear and convincing" standard, even though the district court found that there existed a legitimate, nondiscriminatory, and nonpretextual reason for the employment decision, and even though there was no showing that discriminatory bias played any causal role in that decision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 825 F.2d 458. The opinion of the district court (Gesell, D.J.) (Pet. App. 40a-62a) is reported at 618 F. Supp. 1109.

JURISDICTION

The judgment of the court of appeals (Pet. App. 63a-64a) was entered on August 4, 1987, and a petition for rehearing was denied on September 30, 1987 (Pet. App. 65a). On December 11, 1987, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to January 12, 1988, and the petition was filed on that date. The petition was granted on March 7, 1988 (J.A. 83). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. *Introduction.* This case raises the question whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 *et seq.*, is violated in cases where the defendant shows that it had a valid, nondiscriminatory reason for the challenged employment decision and the plaintiff fails to show by a preponderance of the evidence that that reason was a pretext and that the employment decision was caused by a discriminatory motive.

A divided panel of the court of appeals (Edwards, J., and Joyce Hens Green, D.J., with Williams, J., dissenting) held that Price Waterhouse violated Title VII when it declined to make respondent, Ann B. Hopkins, a partner in the firm. The court of appeals did not disturb the district court's factual finding that Price Waterhouse had established a legitimate, nondiscriminatory, and nonpretextual basis for its decision not to make Hopkins a partner, but it held that that showing was insufficient to negate liability under Title VII because the process by which Hopkins was considered for partnership may have included some unquantifiable measure of unconscious "sex stereotyping." Even though Hopkins presented no evidence of any individual or collective illicit motivation on the part of any of the persons actually responsible for making the partnership decision at Price Waterhouse, the court of appeals characterized the case as one involving "mixed motives" on the basis of the testimony of an "expert * * * in the field of [sex] stereotyping" (Pet. App. 53a) who purported to see "sex stereotyping" in some of the expressions used about Hopkins by a few individuals (none of them final decisionmakers in her case, and all but one of them *supporters* of her partnership bid). It then held that in such "mixed motives" cases (a) the *defendant* employer bears the burden of proving that unlawful bias was not the determinative factor in the challenged employment decision; and (b) that burden must be carried by "*clear and convincing*" evidence.

The court of appeals acknowledged (Pet. App. 22a) that its ruling, that an employer allegedly actuated by "mixed motives" must prove that intentional discrimination was not the determinative factor in its employment decision, represents a departure from this Court's allocation of the burden of proof in Title VII actions in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). In *Burdine*, the Court stated that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U.S. at 253. Building on its decision in *McDonnell Douglas*, the Court in *Burdine* established a "division of intermediate evidentiary burdens" designed to resolve the "ultimate question" of intentional discrimination that a plaintiff must prove. 450 U.S. at 253. First, the plaintiff must show by a "preponderance of the evidence a prima facie case of discrimination." *Ibid.* The defendant is then permitted to meet that preliminary showing by "'articulat[ing] some legitimate, nondiscriminatory reason for the employee's rejection.'" *Ibid.* (quoting *McDonnell Douglas*, 411 U.S. at 802). If the defendant comes forward with such evidence, as Price Waterhouse did in this case, the plaintiff must then attempt "to demonstrate that the proffered reason was not the true reason for the employment decision." *Burdine*, 450 U.S. at 256. Only a plaintiff who makes such a showing by a preponderance of the evidence will have successfully carried her burden of proving that she was "the victim of intentional discrimination." *Ibid.* The imposition of Title VII liability on Price Waterhouse, absent a showing that discrimination was a "but for" cause of the adverse partnership decision, is inconsistent with *Burdine*'s allocation to the plaintiff of this ultimate burden of persuasion.

In addition to holding that the defendant in a "mixed motives" case must bear the burden of proving that dis-

crimination was not a "but for" cause of its employment decision, the court of appeals made two other rulings that we challenge. First, the court of appeals erred in characterizing this case as one involving "mixed motives," even though there was no palpable or substantial evidence in the record that discrimination was a decisive causal factor in Hopkins' failure to make partner. Second, the court erred in holding that the employer must negative unlawful bias by the extraordinary standard of "clear and convincing" evidence.

2. *The Partnership Selection Process At Price Waterhouse.* Each year, new partners at Price Waterhouse are selected from among the firm's senior managers. The "elaborate recommendation and review process" whereby new partners are chosen (Pet. App. 41a) begins when partners in local offices of the firm draft a written proposal that a senior manager from their office be considered for partnership. These proposals are circulated to all of the firm's partners, who are invited to comment on candidates by submitting a "long form" evaluation if they have had "significant and recent contact with the candidate" (*ibid.*) or a "short form" evaluation if their contact has been more limited. See Def. Exh. 21, 22, & 23. The evaluation forms ask partners submitting comments to rank each candidate relative to other candidates recently considered for partnership against an "exhaustive list of relevant, neutral criteria," including practice development, technical expertise, interpersonal skills, and participation in civic activities. Pet. App. 41a-42a. The forms also ask the partners to indicate whether they believe the candidate should be granted or denied admission to the partnership, or held over for consideration in a later year, and request a short explanation of the recommendation made. *Ibid.*

The Admissions Committee of the firm's governing Policy Board reviews the entire file of each candidate, including the long and short form evaluations, and interviews partners who have submitted comments to learn more about the basis for their views and recommendations. The Admissions Committee, at a series of meetings, then evaluates in depth all of the information on each candidate, and makes a recommendation to the Policy Board. If the Admissions Committee recommends that a particular candidate be rejected or "held," it also prepares a short memorandum summarizing the basis for its recommendation. Pet. App. 42a.

The Policy Board reviews the recommendations of the Admissions Committee and votes to include the candidate on a firm-wide partnership ballot, to "hold" the candidate, or to reject the candidate. Candidates placed on the ballot must be approved by a two-thirds vote of the entire partnership. Candidates whom the Policy Board votes to reject or to "hold" are informed of the reason for the Policy Board's decision.

3. *The District Court's Findings.* In 1982, Hopkins was proposed for admission to the Price Waterhouse partnership by the partners in the Office of Government Services (OGS) in Washington, D.C., where she had been employed as a manager and then a senior manager since 1978. Def. Exh. 20. Thirty-two partners submitted forms evaluating her candidacy. Of these, thirteen recommended that she be admitted to the partnership, eight recommended that she be denied admission, three recommended that she be "held" for consideration in a subsequent year, and another eight stated that they lacked a sufficient basis upon which to make a recommendation. Pet. App. 43a. Many partners made comments about Hopkins' abrasive personality and poor interpersonal skills, noting in particular her impatience, insensitivity, and use of profanity in dealing with staff. *Id.* at 43a-44a. As a result, the Admissions Committee recommended that she be held "at least a year to afford time to demonstrate that she has the personal and leadership qualities required of a partner." *Id.* at 44a (quoting Plf. Exh. 19; Tr. 267-268). The Policy Board adopted the

Admissions Committee's recommendation, and Hopkins was advised of the basis for that decision. Pet. App. 44a.[1]

By the time the annual partnership selection process began again in 1983, two OGS partners had withdrawn their earlier support for Hopkins. Hopkins' advocates within OGS concluded that reconsideration in the 1983 partnership selection cycle would therefore be in vain. Accordingly, Hopkins was advised that OGS would not repropose her for partnership. Although Hopkins was told that she could remain as a senior manager, she resigned from the firm in January 1984. Pet. App. 7a.

Hopkins then initiated this action in the United States District Court for the District of Columbia, claiming that unlawful sex discrimination was the cause of both Price Waterhouse's initial decision to place her partnership candidacy on hold and the subsequent decision of the OGS partners not to repropose her for partnership in the following year. (The latter allegation is not before this Court, because the district court ruled that the decision not to repropose Hopkins was not discriminatory (Pet. App. 48a), and Hopkins did not appeal that determination.) In response, Price Waterhouse showed that during her five-year period of employment with the firm Hopkins' abrasive personality and poor interpersonal skills created grave problems, and made it particularly difficult for employees subject to her supervision to work harmoniously with her. The district court accepted this showing, agreeing with Price Waterhouse that Hopkins "had considerable problems dealing with staff and peers." *Id.* at 59a. Indeed, after carefully examining Hopkins' employment history at Price Waterhouse, the district court found that both "[s]upporters and opponents of her candidacy indicated that [Hopkins] was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff." *Id.* at 43a-44a. The district court concluded that the complaints about Hopkins' "interpersonal skills were not fabricated as a pretext for discrimination" and that Hopkins' "conduct provided ample justification for the complaints that formed the basis of the Policy Board's decision" that her partnership candidacy should be postponed for at least one year. *Id.* at 46a-47a.

[1] At the time of trial in this case (March 1985), Price Waterhouse had a total of 662 partners, seven of whom were women. Pet. App. 41a, 43a. As of July 1, 1987, Price Waterhouse had a total of 805 partners, 17 of whom were women. Another 93 persons will be admitted to the partnership effective July 1, 1988, seven of whom are women. The district court rejected Hopkins' claim that the allegedly small number of women partners at Price Waterhouse indicated discrimination. The court noted that Hopkins' "proof lacked sufficient data on the number of qualified women available for partnership * * *. Women have only recently entered the accounting and related fields in large numbers and there is evidence that many potential women partners were hired away from Price Waterhouse by clients and rival accounting firms." *Id.* at 50a-51a.

Hopkins was the only woman in her partnership "class" of 88 candidates, the successful members of which became partners effective July 1, 1983. Forty-seven of the 88 candidates were admitted to the partnership, 20 candidates (Hopkins and 19 men) were held for consideration in a later year, and the remaining 21 men were rejected outright. Pet. App. 5a. As these figures show, typically about half of the candidates proposed in any year are admitted to the partnership, and the other half divide between those who are held and those who are rejected.

There was overwhelming evidence before the district court to support these findings and conclusions. Hopkins herself testified that she was "abrasive," "candid," and "hard driving" (Tr. 41, 44-45), and characterized herself as "a bitch" during a major project (Tr. 109). Staff who had worked under Hopkins described her behavior in strong terms. One consultant described Hopkins' manner toward him as "abrupt" and "insensitive" (Tr. 363). He testified that "it was tough dealing with Ann and I don't think that I've had that type of same tough experience prior to or after" working for her (Tr. 371). Another employee (who testified *on Hopkins' behalf*) indicated that "it required 'diplomacy, patience and guts' to work with her" (Pet. App. 46a, quoting Tr. 434). And one consultant actually quit the firm in part because he could not tolerate working with her (Tr. 193-194),

citing an incident in which Hopkins had screamed obscenities at him for 45 minutes (Tr. 193).

There was evidence too that Hopkins had a "condescending attitude[]" toward the staff assigned to her projects (Tr. 351). Working for her was "demeaning at times" (Tr. 363), and one consultant testified that he felt Hopkins "looked down upon" him (Tr. 364). Some staff members called Hopkins "Queen Ann" because of her "regal bearing" toward them (Tr. 164). Hopkins gave a particularly clear indication of the low regard she had for the employees working under her when, during a lunch with some partners in 1981, she launched a vitriolic attack on staff members. This so angered the partners present that they cut the lunch short. The incident was described by OGS partner Thomas Beyer, Hopkins' strongest supporter in the firm:

> Ann and I and Lew Krulwich, one of our partners, * * * went off to lunch together. * * * [A]nd we were eating and just kind of passing time as our lunch—and something happened to Ann. I wasn't quite sure what. But she began to—began to criticize a number of the people in the office at different levels. In different fashions. At first I passed it off thinking well, this is, this is Ann. She's probably tired. I couldn't—I really didn't have much regard for it. But Ann kept up with it. Lew was silent and—not saying anything and Ann kept on talking * * *. And it got more vitriolic. More striking. And after awhile I began to get quite angry * * *. At that point, Lew, kind of trying to settle the situation, said, look, let's quit and go back to work. We walked back in silence and I went off to my office still quite angry that Ann had done this.

Tr. 197-197A. Later that afternoon, Beyer told Hopkins that "you're making it extremely difficult for me if you keep this up to try to develop an image, an awareness that you are in fact a fine partner candidate in the firm. How do I convey that message to the partners in the firm when you have outbursts like this, unprovoked as far as I can tell, and certainly questionable." Tr. 198.

Hopkins' handling of staff work assignments also reflected insensitivity and lack of concern for subordinates. Her management style was one of "perpetual crisis," and if she could not convince the staff that there was a crisis, "she [would] go out and create one" (Tr. 327-328). She created "chaos" among staff (Tr. 364) by assigning "unstructured, almost trial and error" tasks (Def. Exh. 25;[2] see also Tr. 273), giving so little direction that the work would have to be done over and over again (Tr. 364-365). The staff "resented [Hopkins'] relationship with them" (Tr. 164), and became "frustrat[ed]" (Tr. 365) and "somewhat alienated" (Tr. 367; see also Def. Exh. 31).

Though Hopkins by most accounts had good technical skills and was accepted by clients once they "adjusted to her hard driving style and no-nonsense approach" (as her most enthusiastic supporter put it) (Def. Exh. 9), her abrupt and abrasive manner and her insensitivity and condescension toward employees caused problems throughout her tenure at Price Waterhouse. Beyer, the partner in charge of OGS, testified that he heard complaints about her relations with staff almost from the day he transferred from the Boston office to OGS in 1979. Tr. 163-164. Consistently, in evaluations of her work and in formal counseling sessions, partners detailed problems in the way Hopkins dealt with staff and urged her to correct those problems. As the district court found, Hopkins "[a]t the time * * * indicated that she agreed with many of these criticisms" (Pet. App. 46a). The evidence showed that she nevertheless continued to be abrasive and difficult to work for.

An annual performance review of Hopkins' work during 1979-80 stated that in order to enhance her "partnership potential, [Hopkins] must improve her interpersonal

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[2] We are lodging with the Court copies of Defendant's Exhibits 7, 9, 11, 13, 14, 15, 17, 24, 25, 27, 30, 31, and 37 and Plaintiff's Exhibits 12, 13, 14, 15, 17 (last two pages), and 37. These exhibits contain handwritten notes and other material that could not be reproduced in the Joint Appendix.

skills" (Def. Exh. 7). This theme recurred repeatedly in evaluations of Hopkins' work. Her deficiencies with respect to "relationships within the office" were the "primary focus," for example, of her 1981 counseling session (Def. Exh. 11). During that session, the importance of interpersonal skills in the evaluation of candidates for partnership was emphasized, and Hopkins agreed that it was important that she make progress in that area (*ibid.*). Nonetheless, Hopkins was told at her 1982 counseling session that she remained "overly assertive," intolerant, impatient, and insensitive to staff development (Def. Exh. 17); and in various reports on her work made during 1982, partners stated that Hopkins was "overly critical" (Def. Exh. 14), needed to become "more sensitive to others" (Def. Exh. 24), and needed to "demonstrate people skills" (Def. Exh. 25). Following Hopkins' work on a project in Price Waterhouse's St. Louis office, one partner there wrote that "[d]ealing effectively and motivationally with staff is Ann's primary apparent weakness," and "the one area where Ann needs to show improvement to become a partner" (*ibid.*). Another partner was moved to report that Hopkins approached the St. Louis project as if it were a "fire drill" and "alienated almost everyone who worked on [it]" (Def. Exh. 31). As a consequence, "[n]o one want[ed] to work with her" in the future (*ibid.*).

This substantial history of severely strained relations with staff was a major focus of the comments made about Hopkins by partners who completed long or short form evaluations when she was considered as a partnership candidate. These negative comments were not limited to partners who opposed her candidacy. One of her early supporters, OGS partner Donald Epelbaum, wrote that Hopkins could "be abrasive, unduly harsh, difficult to work with &, as a result, cause[d] significant turmoil" (Def. Exh. 27), while other supporters commented that she was "a 'tough cookie'" (*ibid.*, Hart) who was "somewhat lacking in the congeniality dept." (*ibid.*, Powell), and who "drives too hard" and "lose[s] sensitivity for

staff" (*ibid.*, Beyer). Moreover, even those partners who considered their contacts with Hopkins insufficient to make a judgment as to whether she should become a partner were able to comment on her interpersonal skills, showing that this problem pervaded Hopkins' entire situation at Price Waterhouse. These partners, although they had less frequent contact with Hopkins, reported that in their experience she was "weak in interpersonal skills" (*ibid.*, Johnson), "arrogan[t] & self-centered" (*ibid.*, Haller), "abrasive" (*ibid.*, Hartz), and "extremely overbearing" (*ibid.*, Green).

Among those who did not favor making Hopkins a partner, one partner had concluded that she was "potentially dangerous" (Def. Exh. 27, Statland), and another (who later changed his mind and supported Hopkins) thought she had shown herself capable of "abus[ing] authority" if she were to become a partner (*ibid.*, Coffey). Others making "no" or "hold" recommendations noted that Hopkins was "universally disliked" by staff (*ibid.*, Everett), who did not want to work for her (*ibid.*, Fridley, Statland, and Coffey), and that she was "consistently annoying and irritating" (*ibid.*, Hoffman), "unpleasant" (*ibid.*, Whelan), and "very abrasive" (*ibid.*, Blythe).

The evidence outlined above demonstrates that, far from being generated by sexist biases, these comments were simply accurate reports about Hopkins. That is why the district court found that these complaints were justified by the evidence. The central question about Hopkins' suitability for partnership at Price Waterhouse was epitomized by the partner who asked whether her "personality [would] limit her ability to successfully market work, retain staff & maintain satisfactory relations with her [partners]" (Def. Exh. 27, Hartz). The evidence provides ample support for the Policy Board's reservations.

In addition to finding that Hopkins' behavior provided good grounds for the various negative comments made in the partnership evaluation forms, the district court also

rejected Hopkins' attempt, based on a comparison of her file with those of similarly situated men, to show that Price Waterhouse treated her differently from male candidates with overly aggressive or abrasive personalities. At the same time, however, the district court believed that some of the negative characterizations about Hopkins' foul language, arrogance, and impatience—*e.g.*, that she needed to take a "course at charm school" (Def. Exh. 27, Hoffman)—reflected "unconscious" (Pet. App. 54a) but "discriminatory [sex] stereotyp[ing]." *Id.* at 57a. Still, the district court balanced this evidence against the record of acknowledged "deficiencies" in Hopkins' performance (*id.* at 46a). At the end of the day, the district court found, Hopkins had proven only that sex stereotyping "played an *undefined* role in blocking [her] admission to the partnership." *Id.* at 54a (emphasis added). Because of this inconclusive showing by Hopkins, the district court found,

> the Court cannot say that [Hopkins] would have been elected to partnership if the Policy Board's decision had not been tainted by sexually biased evaluations.

Id. at 59a.

The district court thus found that Hopkins had not shown that discrimination by Price Waterhouse *caused* the harm she was suing to redress: the evidence did not establish that she would have made partner even in the absence of any sexual stereotyping or that such conduct was actually a motivating factor in Price Waterhouse's decision. Indeed, the district court did not find even "unconscious" stereotyping on the part of any person at Price Waterhouse responsible for actually making the relevant decision about Hopkins.

Nevertheless, the district court found that Title VII was violated. The violation was deemed to arise from the confluence of three factors, none of which the court thought was discriminatory standing alone. First, "[c]omments influenced"—albeit unconsciously—"by sex stereotypes were made by partners." Second,

> the firm's evaluation process gave substantial weight to these comments; and [third,] the partnership failed to address the conspicuous problem of stereotyping in partnership evaluations. While these three factors might have been innocent alone, they combined to produce discrimination in the case of this plaintiff.

Pet. App. 58a. In short, Price Waterhouse was found liable because, "[d]espite the fact that the comments on women candidates often suggested that the male evaluators may have been influenced by a sex bias, the Policy Board never addressed the problem." *Id.* at 55a.

The defendant's liability was thus *not* predicated upon an employment decision shown to have been made on the basis of gender; the district court did not find that discrimination caused Hopkins' rejection. Rather, Price Waterhouse was found to have committed an intentional violation of Title VII because it failed to counteract the unconscious sexism that Hopkins' expert read into the colloquialisms of some of Hopkins' colleagues—none of them the ultimate decisionmakers—who had commented on her performance in the course of the evaluation process.

The district court's imposition of liability, notwithstanding its failure to find that Hopkins' rejection was caused by discrimination, is particularly troubling because of the way in which the existence of even "unconscious" sex stereotyping was divined. The district court's insight into these unconscious elements of Price Waterhouse's partnership decisionmaking process came primarily from the testimony of Dr. Susan Fiske, described by the district court as "a well qualified expert" in the "field of stereotyping." Pet. App. 53a. Although Dr. Fiske had never met Hopkins, and made no inquiry whatever into the *facts* of Hopkins' actual performance at Price Waterhouse, her review of the written comments made by Price Waterhouse partners about Hopkins' performance enabled her to opine that the partners' negative statements about Hopkins were caused by sexual

stereotypes rather than the reality that they accurately described. Dr. Fiske purported to find sex stereotyping in comments that Hopkins was "overbearing," "arrogant," "self-centered," and "abrasive," and that Hopkins "r[an] over people" and was disliked by staff (J.A. 60). Dr. Fiske reached this conclusion by simply *excluding* from her consideration the actual evidence of Hopkins' behavior, evidence that persuaded even the district court that Hopkins' "conduct provided ample justification for the complaints" about her. Pet. App. 46a-47a. Here is a typical exchange:

> Q. * * * Some of these folks describe Miss Hopkins, as you have read back to me, as overbearing, arrogant, self-centered, abrasive, thinks she knows more than anyone in the universe, and potentially dangerous. Would you think it would be somehow a stereotypical decision to exclude such a person from the partnership if that was in fact true?
>
> A. I am not qualified to say whether or not it is true * * * [b]ecause I didn't observe her behavior.

J.A. 64.

As Judge Williams, dissenting below, observed, Dr. Fiske's approach means that "if an observer characterized someone as 'overbearing and arrogant and abrasive and running over people,' an expert such as Dr. Fiske could discern * * * that [those comments] stemmed from unconscious stereotypes * * * without meeting the subject of the comment or making any inquiry into a possible factual basis." Pet. App. 36a. Further, Dr. Fiske found forbidden motives even in the comments of partners who *supported* Hopkins' partnership bid, testifying that their favorable comments were efforts "to overcome their stereotypical attitudes." *Id.* at 13a n.3 (citing Tr. 565 (J.A. 42)). It seems clear, therefore, that on this approach "no woman could *be* overbearing, arrogant or abrasive: any observations to that effect would necessarily be discounted as the product of stereotyping. If analysis like this is to prevail in federal courts, no employer can base any adverse action as to

a woman on such attributes." Pet. App. 36a (Williams, J., dissenting).

4. *The Court Of Appeals' Decision.* A divided panel of the court of appeals affirmed the district court's finding of liability as well as the theory upon which it was based. The court expressly recognized that the causation issue was at the center of the case. Noting the split among the circuits as to where the burden of proof should be placed (Pet. App. 20a-21a & n.8), the court of appeals rejected Price Waterhouse's cross-appeal only "[b]ecause Price Waterhouse could not demonstrate by clear and convincing evidence that impermissible bias was not the determinative factor" (*id.* at 25a). Price Waterhouse was held to have violated Title VII solely on the basis of the amorphous proposition that "stereotypical attitudes towards women had manifested themselves in connection with the partnership bids of other women and * * * that these stereotypes had been brought to bear on [Hopkins'] candidacy" (*id.* at 20a)—even though Hopkins had not proved that she would have been made a partner in the absence of stereotyping. Indeed, the court of appeals expressly refused to require Hopkins to make any such showing. Assigning to Title VII plaintiffs the burden of proof on each element of their cases, including causation, the court held, would "place an enormous, perhaps insurmountable, burden on Title VII litigants" (*ibid.*). Instead, the court of appeals shifted the burden to Price Waterhouse to negate by "clear and convincing" evidence a fact that the court acknowledged was "impossible to measure." Pet. App. 9a.[3]

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[3] In addition, the court of appeals reversed the district court and held that the decision of the OGS partners not to repropose Hopkins for partnership in 1983 constituted a "constructive discharge." Accordingly, the court remanded the case for further proceedings on the question of remedy. Pet. App. 25a-28a. Those proceedings have been stayed pending this Court's decision in this case.

In dissent, Judge Williams agreed that the central issue on appeal was causation, but observed that "the record here provided no causal connection between Hopkins's fate and such stereotyping as went on among Price Waterhouse's 662 partners." Pet. App. 29a.[4] Judge Williams also was troubled by Dr. Fiske's impressive claim that she was "able to find forbidden stereotyping simply by reading partners' comments—without information about the truth of the matters commented upon." *Id.* at 36a. Finally, Judge Williams objected to the majority's

[4] As Judge Williams noted, "[t]he only remark by a Hopkins *opponent* that can be characterized as manifesting sexual stereotyping is the facetious suggestion that she should take a 'course at charm school.' The smoke from this gun seems to me rather wispy. It was embedded in the following comment:

> Contacts with Ann are only casual—several mtgs at OGS and MMGS sessions. However, she is consistently annoying and irritating--believes she knows more than anyone about anything, is not afraid to let the world know it. Suggest a course at charm school before she is considered for admission. I would be embarrassed to introduce her as a ptnr."

Pet. App. 33a (emphasis added). The majority was able to find evidence of sex stereotyping in the "charm school" remark only by resorting to Webster's definition, not of that term, but of the term "finishing school." See *id.* at 13a n.4. But Webster's defines "charm school" in sex-neutral terms, stating simply that it is "a school in which social graces are taught." Webster's Third New International Dictionary 378 (1986). The majority did not explain why it would be discriminatory for Price Waterhouse to insist that all of its partners, male and female, be schooled in the "social graces."

In her Brief in Opposition, Hopkins never mentioned the "charm school" remark as evidence of discrimination. Instead, she belabored a single comment made by Thomas Beyer, her strongest supporter. See Br. in Opp. 3, 4, 6, 7. Hopkins testified that *after* her partnership candidacy had been placed on "hold," Beyer advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Pet. App. 52a (citing Tr. 102, 316). The record is clear that Beyer's advice was an entirely personal reaction to Hopkins' situation and gives no probative insight into the reasons for her rejection. See Tr. 87-95, 168, 212-213. As Judge Williams correctly recognized in dissent (Pet. App. 31a-32a), the record provides absolutely no support for attributing Beyer's personal advice to the Policy Board.

willingness to find that the mere presence of stereotyping would result in Title VII liability unless the employer undertook "to institute special programs for sensitizing partners to sex stereotyping, or otherwise to stamp it out of the evaluation process." *Id.* at 37a. Judge Williams suggested that,

> [i]f such an omission is to ground liability, perhaps the plaintiff should bear an initial burden of demonstrating that gender stereotyping was more probably than not the cause of the adverse employment decision. * * *
>
> From the facts here, it looks as though the duty to sensitize has a hair trigger. The implications are serious. The more delicate the trigger, the more completely this court has dropped the requirement of intentional discrimination out of the law. * * * The rule turns Title VII from a prohibition of discriminatory conduct into an engine for rooting out sexist thoughts.

Ibid.

SUMMARY OF ARGUMENT

This Court has held that the burden of persuasion in Title VII disparate treatment cases remains at all times with the plaintiff. *Burdine*, 450 U.S. at 256. The court of appeals' decision contravenes that principle in at least three ways. First, the court's decision requires the *defendant* in so-called "mixed motives" cases to prove that discrimination did *not* cause the adverse employment decision, rather than requiring the plaintiff to prove that, absent unlawful discrimination, she would have been hired or promoted. Second, even if it is appropriate to relieve the plaintiff of the ultimate burden of persuasion on the question of causation in some circumstances, the court of appeals erred by requiring the defendant to make its showing by "clear and convincing" evidence. Third, the court of appeals improperly evaded the holding of *Burdine* by characterizing this case as one of "mixed motives" on the basis of intuitions about unconscious sexism—discernible only through an "expert" judgment that in fact ignored most of the *actual* evi-

dence in the case—that was not shown to have had a causal impact on the disputed employment decision. The net effect of the court of appeals' decision is to place an extraordinary and unjustified burden on an employer, even where there exists overwhelming evidence of a legitimate, nondiscriminatory, and nonpretextual basis for its refusal to promote a Title VII plaintiff.

1. The necessary starting point for analyzing this case is the *substantive* standard of Title VII liability that Congress created. The express language of Title VII, prohibiting discriminatory actions taken *because of* a plaintiff's sex (42 U.S.C. § 2000e-2(a)(1)), and specifying that Title VII relief may not be granted if the employment decision was made "for any reason other than discrimination on account of * * * sex" (42 U.S.C. § 2000e-5(g)), as well as the statute's history, make it unmistakably clear that Title VII is violated only when an employment decision was in fact *caused* by a prohibited motive. Title VII does not make unlawful the mere presence of discriminatory thoughts and expressions, if those thoughts and expressions did not play a *decisive* role in the challenged employment decision. Thus, quite apart from burden of proof, the substantive standard of liability under Title VII is the "but for" standard; Title VII has not been violated if the employment decision would have been the same even in the absence of any allegedly unlawful motive.

In light of this substantive standard, allocating the burden of persuasion is not difficult. This Court's prior Title VII decisions uniformly dictate that it is the *plaintiff* who *always* bears the ultimate burden of persuasion on the issue of causation. See, *e.g.*, *Burdine*, 450 U.S. at 253; *McDonnell Douglas*, 411 U.S. at 805. In *all* Title VII disparate treatment cases in which the employer proffers a legitimate, nondiscriminatory reason for the employment decision, the crucial inquiry on the question of causation occurs at the third and final stage of the *Burdine* analysis, where the plaintiff must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons." 450 U.S. at 253.

With virtually no supporting precedent, the court of appeals here discarded the essential third stage of the *Burdine* framework, claiming that it was inapplicable in so-called "mixed motives" cases. See Pet. App. 22a. Instead, the court of appeals held that, in such cases, the *employer* must meet the heavy burden of proving the negative proposition that "impermissible bias was *not* the determinative factor" in its decision. *Id.* at 25a (emphasis added). But the court failed to explain why characterizing a case as one involving "mixed motives" justifies such a radical departure from the rules already established by this Court for resolution of the ultimate question of causation. Irrespective of whether a case can be said to involve "mixed motives," *Burdine*'s holding that the plaintiff retains the "ultimate burden of persuading the court that she has been the victim of intentional discrimination" (450 U.S. at 256) precludes a Title VII *defendant* from being saddled with the burden of persuasion on the question of causation. See also *Bd. of Trustees* v. *Sweeney*, 439 U.S. 24, 25 (1978) (per curiam) (defendant in Title VII case may not be required to prove *absence* of discriminatory motive).

2. The court of appeals not only switched the ultimate burden of persuasion on the question of causation from the plaintiff to the defendant; it further held that the defendant must meet that burden by the extraordinary standard of "clear and convincing" evidence. In rare and compelling circumstances this Court has been willing to impose the "clear and convincing" standard on *plaintiffs* who seek the courts' aid in imposing sanctions or duties on a defendant; but subjecting a *defendant* to coercion by a court order unless it disproves the plaintiff's allegations by "clear and convincing" evidence is wholly unprecedented. In the absence of any indication from Congress that it intended such a substantial departure from the traditional rules of the legal system, this

aspect of the court of appeals' decision cannot be allowed to stand.

3. The burden-shifting rule imposed by the court of appeals has no legitimate place whatever in Title VII disparate treatment cases. But it is in any event unjustified in this case, because this case should never have been characterized as a "mixed motives" case at all. Here, the only indication of the existence of "mixed motives" was the gossamer evidence provided by Dr. Fiske, an "expert" in the field of "sex stereotyping," who purported to find stereotyping in some of the expressions used about Hopkins in the written evaluations of her performance. But Dr. Fiske had never met Hopkins, had never met any of the Price Waterhouse partners whose comments about Hopkins she was characterizing, and knew nothing whatever of Hopkins' *actual* behavior at Price Waterhouse. Indeed, Dr. Fiske was able to conclude that "sex stereotyping" played a part in the employment decision only by *excluding* from consideration all of the actual facts of Hopkins' performance at Price Waterhouse—facts that showed that the partners' chosen words, far from reflecting stereotypic thinking, accurately described the reality of Hopkins' behavior.

If evidence such as Dr. Fiske's is sufficient to transform a case into one involving "mixed motives" for the employment decision, then virtually any case can be so labeled. *Burdine*'s rule—that the *plaintiff* must prove that intentional discrimination caused her injury—will simply disappear in a sea of findings of "mixed motives" that are wholly lacking in concrete evidentiary support. At a minimum, therefore, this Court should rule that the court of appeals' burden-shifting rule may not be invoked in the absence of a substantial, concrete basis in the record to support a finding that the legitimate reason offered by the employer was not the "true reason" for its decision. Applying that standard here, it is clear that the court of appeals' burden-shifting ruling must be reversed.

ARGUMENT

TITLE VII IS NOT VIOLATED IN THE ABSENCE OF PROOF BY THE PLAINTIFF THAT THE CHALLENGED EMPLOYMENT DECISION WAS CAUSED BY INTENTIONAL DISCRIMINATION

A. A Title VII Plaintiff May Prevail Only By Showing That Forbidden Discrimination Was A "But For" Cause Of The Challenged Employment Decision.

1. *As A Matter Of Substantive Law, Title VII Is Not Violated Unless Discrimination Is A "But For" Cause Of The Challenged Employment Decision.*

The ultimate question for this Court in this case is: who has the burden of persuasion on the question of why Hopkins was not promoted to partner.[5] But behind this issue lies an antecedent *substantive* question: apart from burdens of proof, what relationship must exist between arguably discriminatory thoughts and expressions, on the one hand, and the challenged employment decision, on the other, for Title VII to have been violated? Does Title VII make illegal the existence of discriminatory thoughts and expressions, if these do not come into play as a *decisive* reason for an employment decision? As a matter of substantive law, if a failure to promote or a discharge would have occurred in any event, even in the absence of discriminatory thoughts and expressions, has Title VII been violated?

We believe that the necessary starting point for analyzing this case is a clear understanding that the answer to these questions is unequivocally "no." Title VII does not prohibit discrimination "in the air." It has been violated only if the discrimination was a "but for" cause

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[5] Because Hopkins alleged that she was treated differently from male partnership candidates, this case is one involving a claim of "disparate treatment" and not of "disparate impact." This Court has made it clear that issues of proof in these two types of cases are governed by different rules. See, *e.g.*, *United States Postal Service* v. *Aikens*, 460 U.S. 711, 713 n.1 (1983); *Burdine*, 450 U.S. at 252 n.5.

of an adverse employment decision. If that decision would have been made in any event, because it was based on a valid, nondiscriminatory, nonpretextual reason, Title VII has not been violated.

The court of appeals in this case apparently accepted this bedrock proposition, although it did not use the "but for" terminology. The court discussed at length the various formulas that have been adopted by the lower courts to determine the substantive standard of causation applicable in Title VII cases. Pet. App. 20a-23a. The court noted that some courts have adopted a "but for" standard, while other courts have used different verbal formulas.[6] In the end, the court of appeals held that the crucial issue was whether or not unlawful discrimination was "the determinative factor" in the employment decision. Pet. App. 25a.[7]

Congress was of course aware, when it enacted Title VII, that multiple motives could exist in the workplace

[6] See, *e.g.*, *McQuillen* v. *Wisconsin Education Ass'n Council*, 830 F.2d 659, 664 (7th Cir. 1987), cert. denied, 108 S. Ct. 1068 (1988) ("but for" standard); *Lewis* v. *University of Pittsburgh*, 725 F.2d 910, 915 (3d Cir. 1983), cert. denied, 469 U.S. 892 (1984) (same); *Miles* v. *M.N.C. Corp.*, 750 F.2d 867, 875-876 (11th Cir. 1985) ("same decision" test); *Whiting* v. *Jackson State University*, 616 F.2d 116, 121 (5th Cir. 1980) ("*significant* factor" test) (emphasis in original); *Blalock* v. *Metals Trades, Inc.*, 775 F.2d 703, 712 (6th Cir. 1985) (plaintiff must show employment decision "more likely than not motivated by" illicit factor); *Bibbs* v. *Block*, 778 F.2d 1318, 1323 (8th Cir. 1985) (en banc) (enough if illicit factor played "some part" in decision).

[7] At least one court has held that there is a substantive difference between the court of appeals' formula in this case ("the determinative factor") and the traditional "but for" test. See *Lewis*, 725 F.2d at 916-918. Undoubtedly, increased clarity would result if a single verbal formula were used for the substantive standard of causation in Title VII cases, and, because of its long usage, the "but for" formula would serve this purpose better than any other. In the interest of clarity and consistency, therefore, we use the "but for" formula in this brief to mean that, even absent discrimination, the challenged employment decision would have been the same.

and possibly have an impact on employment decisions. But it authorized government intervention only where specific actions were in fact *caused* by discriminatory intent on the part of employers. If unlawful discrimination was not the decisive factor—if the employment decision would have been identical even where discriminatory motives and expressions are wholly absent—there can be no violation of Title VII.

The language and history of Title VII make it quite clear that Congress's goal of assuring equality of employment opportunities was not to be achieved by sacrificing the employer's traditional right to make bona fide employment decisions based on legitimate, job-related, nondiscriminatory factors. As the Seventh Circuit has recently held, the express language of "Title VII contains a clear causal requirement between discriminatory motivation and the challenged employment decision." *McQuillen* v. *Wisconsin Education Ass'n Council*, 830 F.2d 659, 664 (7th Cir. 1987), cert. denied, 108 S. Ct. 1068 (1988). The statute provides that it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's * * * sex" (42 U.S.C. § 2000e-2(a)(1) (emphasis added)). Further, Title VII expressly prohibits courts from requiring "the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, *if such individual was refused * * * employment or advancement * * * for any reason other than discrimination on account of * * * sex*" (42 U.S.C. § 2000e-5(g) (emphasis added)). The statute thus makes it clear that it is not enough that discriminatory thoughts were present in the atmosphere or that discrimination was "a factor" in the challenged employment decision. It must be a factor that made a difference. If the employment decision would have been adverse to the plaintiff in any event, then the plaintiff was not discriminated against *because of* her sex; instead, she was refused "employment or advancement" for a "reason *other than* discrimination

on account of" her sex. 42 U.S.C. §§ 2000e-2(a)(1), 5(g) (emphasis added).

A review of the legislative history makes it clear that Congress simply *assumed* that it was prohibiting discrimination that *caused* unfavorable employment decisions. For example, Representative Celler stated that "[t]he law provides that an act can be only unlawful if it is discriminatory *on the basis of* race, color, creed, sex, or national origin. * * * You can discriminate on any grounds, but you can't discriminate on [illicit] grounds." *Hearing on H. Res. 789 Before the House Comm. on Rules*, 88th Cong., 2d Sess. 8 (1964).[8] The following exchange also is illustrative (110 Cong. Rec. 7257 (1964)):

> Mr. ERVIN. I want those who are engaged in business to be allowed to determine whom they shall employ. They are far better qualified than the Federal Government to know the skills they are seeking to obtain for their business.
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> * * * * *

[8] Much of the legislative history of Title VII was developed during debate on H.R. 7152, 88th Cong., 2d Sess. (1964). As originally introduced, Title VII of H.R. 7152 would have prohibited discrimination only on the basis of race, color, religion, or national origin. During debate, however, the House adopted an amendment extending the coverage of Title VII to sex discrimination as well. 110 Cong. Rec. 2584 (1964). This change was retained by the Senate when it substituted its own version of the bill. *Id.* at 14239. Although the Senate substitute made some major changes in the legislation, it effected no significant revisions to the House version of what became 42 U.S.C. §§ 2000e-2(a)(1) and 2000e-5(g). The Senate substitute was accepted by the House without change when the House passed H. Res. 789, 88th Cong., 2d Sess. (1964). See 110 Cong. Rec. 15969 (1964).

Representative Celler's views are entitled to special weight in light of his role as Chairman of the House Judiciary Committee that considered and held hearings on H.R. 7152. See, *e.g.*, *United States* v. *St. Paul, M. & M. Ry.*, 247 U.S. 310, 318 (1918); *New York State Dep't of Social Services* v. *Dublino*, 413 U.S. 405, 431 n.11 (1973) (Marshall, J., dissenting). Similarly, Senator Case, whose views are noted above, served as one of the Bipartisan Captains during the Senate's consideration of Title VII.

> Mr. CASE. The Senator from North Carolina knows that * * * the bill provides only that such a decision could not be made on the ground of the color of a man's skin or his national origin or his creed. * * * [T]he bill would take effect only when the employer had knowingly discriminated against an employee or a prospective employee because of race, color of the skin, creed, or national origin * * *.

The origins of Section 2000e-5(g) are particularly revealing. As originally introduced, H.R. 7152 prohibited a court from granting relief if an "individual was * * * refused employment or advancement or was suspended or discharged *for cause*" (H.R. 7152, 88th Cong., 2d Sess. 77 (1964) (emphasis added)). In debate on the bill, the phrase "for cause" was deleted and replaced with the more specific and peremptory language that now appears in 42 U.S.C. § 2000e-5(g), prohibiting relief whenever an employer acts "for *any* reason *other than*" a prohibited reason. See 110 Cong. Rec. 2567-2571 (1964) (emphasis added). Representative Celler's speech introducing this amendment makes it clear that the purpose of this section was to make the remedial provisions of the bill congruent with its substantive provisions and that the latter limited the act to situations where discrimination *caused* an unfavorable employment decision (*id.* at 2567):

> Mr. Chairman, the purpose of the amendment is to specify cause. Here the court, for example, cannot find any violation of the act which is based on facts other—and I emphasize "other"—than discrimination on the grounds of race, color, religion, or national origin. The discharge might be based, for example, on incompetence or a morals charge or theft, but the court can only consider charges based on race, color, religion, or national origin. That is the purpose of this amendment.

The same theme was echoed by Representative Gill, who explained that the purpose of the amendment was "to pinch down the orders that can be issued by the court

to a more narrow range. Thus, we would not interfere with discharges for ineptness, or drunkeness. * * * *We would limit orders under this act to the purposes of this act.*" 110 Cong. Rec. 2570 (1964) (emphasis added). The history of Section 2000e-5(g) thus demonstrates that "but for" causation is essential, as a matter of substantive law, to any finding of a violation of the statute.

That the "but for" standard of causation is the correct test under Title VII is not surprising, because that test is the conventional civil law rule. Formulations less stringent than the "but for" test "in effect * * * dispense with proof of anything more than a *possible* causal connection" between a discriminatory motive and the challenged decision. H.L.A. Hart & T. Honore, *Causation in the Law liii* (2d ed. 1985) (emphasis in original). As such, they would result in the imposition of liability on account of perceived "discrimination in the air"—because of vague notions of "societal discrimination" that have not been shown to have harmed the plaintiff directly. This Court has repeatedly refused to adopt such a standard. *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (opinion of Powell, J.); *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 307-308 (1978) (opinion of Powell, J.). See also *Fields* v. *Clark University*, 817 F.2d 931, 935 (1st Cir. 1987) (proof that "the [challenged] decision was infected with discrimination" does not necessarily entitle the plaintiff to relief).

On the one occasion that it has addressed the substantive standard of causation in Title VII cases, this Court adopted the "but for" test, albeit without extended discussion. *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976). And this Court has applied a "but for" test in related contexts. See, *e.g.*, *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983) (involving the standard of causation applicable to discharges based in part on protected union activity); *Mt. Healthy City School Dist.* v. *Doyle*, 429 U.S. 274 (1977)

(involving the standard of causation applicable to discharges based in part on constitutionally-protected conduct).[9]

Commentators also agree that a "but for" test is the appropriate substantive standard of causation. Writing in the context of an age discrimination case, one author has explained why only a "but for" test satisfies congressional intent:

> If relief were granted every time age was considered, the effect might go well beyond the remedial intent of the Act, since relief arguably would be awarded to claimants who never had an opportunity for the job at any age. While such a broad construction would provide a strong deterrent against age discrimination, it probably would exceed the prohibition Congress envisioned.

Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 Vand. L. Rev. 1205, 1256 (1981).

This reasoning is equally applicable in the Title VII context, and of course makes it clear that the mere *presence* of some element of "sex stereotyping" in an employer's decisionmaking process does not in and of itself constitute a violation of Title VII. As Judge Williams recognized in dissent (Pet. App. 37a), Title VII was never intended to be "an engine for rooting out sexist thoughts"; the statute is a prohibition against dis-

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[9] The "but for" test also has been adopted in cases arising under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* See, *e.g.*, *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979) (plaintiff required to prove "that his age was the 'determining factor' in his discharge in the sense that, 'but for' his employer's motive to discriminate * * * he would not have been discharged"). In language that precisely parallels Section 703 of Title VII, the ADEA expressly prohibits only those actions taken "because of" a worker's age. 29 U.S.C. § 623. Although *Loeb* arose under the ADEA, it is frequently cited in Title VII cases. See, *e.g.*, *Burdine*, 450 U.S. at 252 n.4, 258-259; *Lewis* v. *University of Pittsburgh*, 725 F.2d at 917 n.8; *Monteiro* v. *Poole Silver Co.*, 615 F.2d 4, 9 (1st Cir. 1980).

criminatory *conduct* that actually *causes* an adverse employment decision.

This case gives this Court an opportunity to reaffirm the fundamental proposition that Title VII as a substantive matter is not violated unless discrimination was a "but for" cause of an adverse employment decision. That this proposition has recently suffered from erosion is apparent from an examination of the Eighth Circuit's unsound decision in *Bibbs* v. *Block*, 778 F.2d 1318 (1985) (en banc). There, the court held that an employer is *liable* under Title VII even if the plaintiff shows only "that an unlawful motive played *some part* in the employment decision." 778 F.2d at 1323 (emphasis added). The court ruled that such a showing is sufficient to entitle the employee, at a minimum, to a remedy such as declaratory or injunctive relief and partial attorneys' fees. *Id.* at 1324. Although the Eighth Circuit also held that an employer can avoid the imposition of additional relief, such as reinstatement or back pay, if he shows by a preponderance of the evidence that the plaintiff would not have been hired or promoted in any event (*ibid.*), this supposed mitigation should not be allowed to conceal the real effect of the Eighth Circuit's position: a defendant may be held to have violated Title VII even if an illicit factor did not play a *decisive* role in the employment decision.[10] That result is inconsistent with Title VII.[11]

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[10] The Ninth Circuit employs an analysis similar to that adopted in *Bibbs*, but takes an even more extreme position by requiring the defendant to prove *by clear and convincing evidence* that it would have taken the same action absent the prohibited motivation if it is to avoid the award of affirmative relief. *E.g., Fadhl* v. *City & County of San Francisco*, 741 F.2d 1163 (9th Cir. 1984).

[11] In large part, the Eighth Circuit rested its decision on the supposition that Title VII itself, in 42 U.S.C. §§ 2000e-2(a)(1) and 2000e-5(g), distinguishes between the liability and remedy phases of a Title VII case. See 778 F.2d at 1321-1322. This is a clear misreading of the statute. First, the liability provision of the statute, 42 U.S.C. § 2000e-2(a), explicitly requires a *causal* relationship between the discriminatory motive and the employment decision at issue. See page 23, *supra*. Thus, the notion that liability under Title VII may rest on a finding that an illegal motive was merely present is untenable. Second, the legislative history makes it clear that Section 2000e-2(a) and the remedy provision, Section 2000e-5(g), were intended to operate in tandem. As we have noted (see page 25, *supra*), Representative Celler described his amendment to the statute's remedy provision by explaining that its purpose was to "specify cause" and to preclude a court from "find[ing] any *violation* of the act" based on facts other than illicit discrimination. 110 Cong. Rec. 2567 (1964) (emphasis added). Clearly, there was no intent to limit the requirement of a causal connection to the remedy phase of a Title VII case.

2. *The Plaintiff Properly Bears The Burden Of Persuasion On The Issue Of "But For" Causation.*

Once it is clearly understood that Congress did not intend to create any substantive liability under Title VII except in cases where discrimination played a decisive role in an employment decision, the proper allocation of the burden of persuason on the issue of causation becomes apparent: the plaintiff's case fails unless she shows by a preponderance of the evidence that, but for discrimination, she would have been promoted. Congress's purpose to "specify cause" and "pinch down" and "limit" relief to cases where it would achieve the "purposes of the act," and to *exclude* from liability cases where the employment decision is based on facts "other * * * than discrimination" (see remarks of Representatives Celler and Gill, at pages 25-26, *supra*), cannot be achieved if liability is imposed without an *affirmative* showing that discrimination *caused* an unfavorable employment decision. Shifting the burden of persuasion will have the inevitable tendency to sweep within the statute's coverage numerous cases where the employer in fact acted on a bona fide basis, but cannot establish the negative proposition, that discrimination was *not* a decisive factor in its decision. Imposing the burden of persuasion on the employer will therefore have the effect of producing the very result Congress sought to avoid: it will turn Title VII into a statute that punishes legitimate employment decisions *not* based on "race, color, creed, sex, or national origin" (remarks of Rep. Celler, page 24, *supra*).

This Court already has determined that the general rules governing the trial of Title VII suits are to be no different from the rules applicable in other kinds of civil litigation. See, *e.g.*, *United States Postal Service* v. *Aikens*, 460 U.S. 711, 716 (1983) (stating that the differences between Title VII litigation and other civil cases do not mean "that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact"). And *Burdine* itself instructs that the burden of proof is allocated in discrimination cases in the same way it is allocated in other kinds of civil litigation. The ultimate question in a Title VII case, on which the burden of persuasion *never* shifts from the plaintiff, is whether intentional discrimination actually caused the plaintiff's injury. *Burdine*, 450 U.S. at 253-256. Thus, *Burdine* clearly precludes a Title VII defendant from being saddled with proving the *negative* of what this Court already has determined to be the plaintiff's ultimate burden.

Contrary to the court of appeals' view (Pet. App. 22a), *Burdine* and its predecessor, *McDonnell Douglas*, supply the framework for analyzing the ultimate question of intentional discrimination in *all* Title VII disparate treatment cases in which the defendant has advanced a legitimate reason for its employment decision, including so-called "mixed motives" cases. *Burdine* teaches that in *any* case where the employer proffers a nondiscriminatory reason for its action, and so "raises a genuine issue of fact as to whether it discriminated against the plaintiff" (450 U.S. at 254-255), "the burden of persuasion [is on the plaintiff] to demonstrate that the [defendant's] proffered reason was not the true reason for the employment decision" (*id.* at 256), but was a pretext.

In the present case, as in any so-called "mixed motives" case, there can be no serious dispute concerning the first two stages of the *Burdine* framework. Hopkins satisfied *Burdine*'s prima facie case requirement, and Price Waterhouse more than met its burden of "articulating"

a legitimate, nondiscriminatory basis for its decision. Thus, the crucial portion of the *Burdine* analysis is the third and final stage, at which Hopkins should have been required "to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons" (450 U.S. at 253).

According to the court of appeals, however, this third and vital *Burdine* stage disappears altogether in "mixed motives" cases. The plaintiff need no longer prove, once the employer has demonstrated legitimate motives, that those "were not [the employer's] true reasons," but may rest on her showing of discriminatory motive (or, as in this case, a showing of unconscious "sex stereotyping"), confident of success unless the employer can meet the heavy burden of proving the negative proposition that "impermissible bias was not the determinative factor" in its decision (Pet. App. 25a).

The court of appeals utterly failed to explain why the third and final stage of the *Burdine* framework does not sufficiently answer the ultimate question of causation in a "mixed motives" case. If a plaintiff succeeds in proving that the employer's proffered motive was pretextual and not its true reason, she will simultaneously have succeeded in proving that, but for intentional discrimination, the challenged employment decision would not have been made. This is so irrespective of whether the case is characterized as involving "mixed motives."[12] Given the

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[12] The court of appeals' mistaken belief that the *Burdine* framework and its crucial third stage are inapplicable in "mixed motives" cases may have resulted from an unduly narrow understanding of what the *Burdine* Court meant by a "pretextual" reason. The court of appeals seems to have thought that in order to prove that a legitimate reason proffered by an employer was "pretextual," and not the "true reason" for the challenged employment action, the plaintiff must demonstrate that the reason given was "in fact a coverup for a * * * discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805. Having apparently read *Burdine* as governing only the narrow class of cases in which the plaintiff alleges that the employer's

identity of the ultimate issue in all cases in which the parties make differing claims about what in fact caused the challenged employment decision—an issue as to which *Burdine* teaches that the plaintiff always bears the burden of persuasion—there can be "no basis for transposing a burden of proof upon a private employer in a Title VII * * * case, irrespective of the nature or quantum of the plaintiff's proof." Edwards, *Direct Evidence of Discriminatory Intent and the Burden of Proof: An Analysis and Critique*, 43 Wash. & Lee L. Rev. 1, 23 (1986). See *Bd. of Trustees* v. *Sweeney*, 439 U.S. 24, 29 (1978) (Stevens, J., dissenting) (in disparate treatment cases, "the ultimate question involves an identification of the real reason for the employment decision. On that question—as all the [Court's Title VII] cases make perfectly clear—it is only the burden of producing evidence * * * which shifts to the employer; the burden of persuasion * * * remains with the plaintiff").[13]

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proffered reason is a "coverup," the court of appeals then felt free to ignore the *Burdine* framework in "mixed motives" cases.

This is an untenable reading of this Court's precedents. The Court plainly stated in *McDonnell Douglas* that after the defendant has asserted a valid reason for its decision, the plaintiff might meet her burden of persuasion on the issue of intentional discrimination *either* by showing the proffered reason to be a "coverup" *or* by showing that "whatever the stated reasons for [her] rejection, the decision was in reality * * * premised" on discriminatory factors (411 U.S. at 805 & n.18)—that is, that the illegitimate motive was a "but for" cause of the decision reached. Furthermore, *Burdine* clearly treats "pretextual" reasons very broadly, including within that characterization any reason that is not the "true reason" that accounts for the employer's decision. 450 U.S. at 253, 256.

The court of appeals' position that different burden of proof rules apply depending on whether "intentional discrimination" is alleged to exist because the employer's stated reason for its decision is a "coverup," or because it is by itself insufficient to explain the decision reached, directly conflicts with the teaching of *McDonnell Douglas* and *Burdine* that the plaintiff bears the ultimate burden of persuasion in any attempt to show that a legitimate reason proffered by the employer was not its "true reason."

[13] Significantly, Hopkins herself recognized that the only real disputed issue in this case was whether Price Waterhouse's proffered explanation for its decision was pretextual and not its true reason, and she framed her argument to the district court in accordance with the traditional *McDonnell Douglas-Burdine* analysis. See, *e.g.*, Plaintiff's Trial Brief 6; Plaintiff's Post-Trial Brief 11.

The court of appeals' rule that *Burdine* is inapplicable in so called "mixed motives" cases (not involving a "coverup" (see note 12, *supra*)) renders nearly useless the delicately balanced analytical framework this Court established in that case. It is a rare Title VII action in which the plaintiff cannot make the claim that the employer had "mixed motives." Cf. *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977) (noting in the context of legislative or administrative decisions that it can "[r]arely * * * be said that * * * a decision [was] motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one"). Thus, under the court of appeals' approach, the *Burdine* framework will have no application in the usual disparate treatment action, and as a general rule it will be the defendant who, contrary to the principle enunciated in *Burdine*, must prove that a discriminatory motive was *not* a "but for" cause of its action.[14]

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[14] In *NLRB* v. *Transportation Management Corp.*, the Court deferred to the NLRB's position that once the General Counsel of the Board has proved that conduct protected by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, was a "substantial" or "motivating" factor in the discharge of an employee, the burden shifts to the employer to prove, by a preponderance of the evidence, "that the discharge would have occurred in any event and for valid reasons" (462 U.S. at 400). *Transportation Management* simply makes it clear that an agency to which Congress has granted broad general powers has authority to adopt this burden of proof allocation. See *Donovan* v. *Stafford Construction Co.*, 732 F.2d 954, 958-959 (D.C. Cir. 1984) (*Transportation Management* makes clear that agency such as Federal Mine Safety and Health Review Commission has power to shift burden to defendant to show plaintiff would have been discharged even absent plaintiff's engaging in protected activity). This rule of deference to agency interpretations of their governing statutes is hardly unique (cf. *Chevron*

The court of appeals' unwarranted evisceration of the *Burdine* analysis not only lacks precedential support, but is incompatible with the clear intent of Congress that the *plaintiff* must prove the causal link between discrimination and the challenged employment decision. See, *e.g.*, 110 Cong. Rec. 2560 (Rep. Goodell) (emphasis added) ("[t]he burden would be on the complainant to show that there had been discrimination. * * * The burden *all the way* would be on those who alleged the discrimination"); *id.* at 6549 (Sen. Humphrey) ("plaintiff would have the burden of proving that discrimination had occurred"); *id.* at 7214 (Interpretative Memorandum submitted by Sen. Clark and Sen. Case, bipartisan floor managers) ("the plaintiff, as in any civil case, would

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U.S.A., Inc. v. *NRDC*, 467 U.S. 837, 842-845 (1984)), but it sheds no light on this Court's task of interpreting Title VII.

In *Mt. Healthy*, 429 U.S. at 287, this Court held that once a plaintiff has shown that constitutionally protected conduct was a "substantial" or "motivating" factor in an adverse employment decision, the burden shifts to the defendant to prove, by a preponderance of the evidence, that it would have reached the same employment decision in the absence of the protected conduct. Of course, *Mt. Healthy* and *Transportation Management* addressed neither the specific language of Title VII nor the clear congressional intent that a Title VII plaintiff bears the ultimate burden of proving that a discriminatory motive made a difference to the decision the employer reached. As one commentator has observed, "[a]lthough *Mt. Healthy* may be applicable to *constitutional* claims involving free speech, equal protection, or due process, there is no basis for transposing a burden of proof upon a private employer in a *Title VII* * * * disparate treatment case." Edwards, *supra*, 43 Wash. & Lee L. Rev. at 23 (emphasis added).

It is of course these distinguishing factors that made it unnecessary for the Seventh Circuit to discuss *Transportation Management* and *Mt. Healthy* in holding that the burden of persuasion in a Title VII disparate treatment case never shifts from the plaintiff, even if the case can be characterized as one involving "mixed motives." *McQuillen*, 830 F.2d at 664. See also *Bellissimo* v. *Westinghouse Elec. Corp.*, 764 F.2d 175, 179 (3d Cir. 1985), cert. denied, 475 U.S. 1035 (1986); *Ross* v. *Communications Satellite Corp.*, 759 F.2d 355, 365-366 (4th Cir. 1985); *Jack* v. *Texaco Research Center*, 743 F.2d 1129, 1131 (5th Cir. 1984).

have the burden of proving that discrimination had occurred"); *id.* at 7255 (Sen. Case) ("[t]he burden of proof is on the plaintiff"); *id.* at 15866 (Sen. Humphrey) ("[t]he burden of proof that discrimination has occurred rests with the complainant").

Traditional indicia for identifying who must bear the burden of persuasion on a fact also lead to the conclusion that the plaintiff in a disparate treatment suit must prove that discrimination was a "but for" cause of the employer's action. The burden of persuasion traditionally is borne by "the party *to whose case the fact is essential.*" 9 J. Wigmore, *Evidence* § 2486, at 288 (Chadbourn rev. 1981) (emphasis in original). As shown above, the language and legislative history of Title VII demonstrate that it is essential to liability under the statute that unlawful discrimination was a "but for" cause of the employment decision of which the plaintiff complains. Since causation is essential to the plaintiff's case, Congress logically provided that the plaintiff should bear the burden of proving it. Similarly, the burden of persuasion is often said to be "upon the *party having in form the affirmative allegation.*" *Ibid.* (emphasis in original). On the issue of causation, that party is obviously the plaintiff.[15]

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[15] The third indicator mentioned by Wigmore—that the burden of persuasion as to a fact is borne by a party "*who presumably has peculiar means of knowledge*" as to that fact (9 Wigmore, *Evidence* § 2486, at 290 (emphasis in original))—does not suggest that a Title VII defendant should bear the burden of persuasion on causation. As this Court noted in *Burdine*, "the liberal discovery rules applicable to any civil suit in federal court are supplemented in a Title VII suit by the plaintiff's access to the Equal Employment Opportunity Commission's investigatory files concerning her complaint," so that a plaintiff should not "find it particularly difficult to prove" the "factual basis" for her case. 450 U.S. at 258. The present case attests to the accuracy of the *Burdine* Court's prediction that a plaintiff would have access to all the information necessary to meet her burden of persuasion. As the district court pointed out, there was "extensive discovery" in this case (Pet. App. 40a), and "Price Waterhouse [was] very forthcoming in providing information on its partnership [selection] process" (*id.* at 49a). In

The court of appeals' rule, placing the burden of disproving intentional discrimination on the employer is, finally, perversely at odds with one of the Court's primary purposes in formulating the *Burdine* framework—to provide a structure that would "bring the litigants and the court expeditiously and fairly to [the] ultimate question" whether the plaintiff has persuaded the trier of fact that intentional discrimination caused her injury. 450 U.S. at 253. The court of appeals' insistence that the *McDonnell Douglas-Burdine* framework is inapplicable in so-called "mixed motives" cases runs counter to this goal by requiring litigants and courts to employ a different mode of analysis even though the ultimate factual inquiry remains exactly the same—whether intentional discrimination in fact caused the injury of which the plaintiff complains.[16]

B. Even If A Defendant Must Show That The Same Decision Would Have Been Made Without The Forbidden Motive, The Court Of Appeals Erred By Requiring That That Showing Be Made By "Clear And Convincing" Evidence.

The court of appeals not only switched the burden of proof to the defendant; it also held that the defendant must meet that burden by "clear and convincing" evi-

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fact, "Price Waterhouse made every document generated by [its partnership] admissions process on candidates proposed for admission in 1982, 1983 and 1984 available to the plaintiff during the course of discovery in this case" (*id.* at 42a).

[16] The proliferation of differing standards and burdens of proof all intended to answer the same question can only add needless complications to the trial of Title VII actions without producing any offsetting gains. Lower federal courts have noted the confusion regarding the proper standards of proof in Title VII cases, thus highlighting the need for a single, easily-applied formula for the trial of these actions. See, *e.g.*, *Bellissimo* v. *Westinghouse Elec. Corp.*, 764 F.2d at 179; *Lewis* v. *University of Pittsburgh*, 725 F.2d at 921 (Adams, J., dissenting); *Unger* v. *Consolidated Foods Corp.*, 657 F.2d 909, 916 n.9 (7th Cir. 1981), vacated, 456 U.S. 1002 (1982) (noting "nearly continuous confusion in the lower courts" on Title VII burdens).

dence. Requiring a *defendant* to bear such a heavy burden is without precedent in this Court's cases. The Court has, on occasion, deemed it appropriate to require *plaintiffs*, who seek the courts' aid in imposing a duty on defendants, to make a showing by "clear and convincing" evidence before that affirmative intervention will occur. But the Court has *never*, as far as we know, held that a *defendant* may be subjected to coercion by a court order unless the defendant disproves the plaintiff's allegations by "clear and convincing" evidence. To impose such a rule on Title VII defendants, without a clear statement by Congress that it wished to perpetrate such a radical innovation, would be fundamentally unfair and illegitimate.

This Court has already indicated that the rules that apply in Title VII cases should not differ from the rules that apply in other civil cases:

> All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be "eyewitness" testimony as to the employer's mental processes. *But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact.*

Aikens, 460 U.S. at 716 (emphasis added); see also *id.* at 718 (Blackmun, J., concurring) ("the ultimate determination of factual liability in discrimination cases should be no different from that in other types of civil suits").

The standard rule in our legal system is that facts are shown by a preponderance of evidence. "The preponderance of the evidence standard * * * is the standard that is applied most frequently in litigation between private parties in every State." *Rivera* v. *Minnich*, 107 S. Ct. 3001, 3003 (1987); see also *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387 (1983); *Addington* v. *Texas*,

441 U.S. 418, 423 (1979); E. Cleary, *McCormick on Evidence* § 340, at 959 (3d ed. 1984); 9 Wigmore, *supra*, § 2498, at 419. And the general use of the preponderance standard is based on the soundest of reasons: it minimizes the risk of erroneous decisions.[17] The preponderance standard is thus the standard most consistent with "[t]he function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, [which] is to minimize the risk of erroneous decisions." *Greenholtz* v. *Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 13 (1979); see Brook, *supra*, at 109 ("Trying to be right as often as possible may be the best we can do."). Further, the preponderance standard is equitable; it "allows both parties to 'share the risk of error in roughly equal fashion.' *Any other standard expresses a preference for one side's interests.*" *Herman & MacLean*, 459 U.S. at 390 (quoting *Addington*, 441 U.S. at 423) (emphasis added).

There must, therefore, exist important reasons before we depart from an equal allocation of the risk of error in civil cases. This Court has, on rare occasions, found such reasons. But all such cases have involved the judgment that the coercive intervention of a court should be withheld unless a strong justification is first shown by the plaintiff; none has used the "clear and convincing" test in order to make such an intervention *easier*.

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[17] See, *e.g.*, 2 K. Davis, *Administrative Law Treatise* § 10.4, at 319 (1979) (elevated standards are "inconsistent with accuracy"); Brook, *Inevitable Errors: The Preponderance of the Evidence Standard in Civil Litigation*, 18 Tulsa L.J. 79, 86 (1982) (preponderance standard "is the one which must be adopted if the decisionmaker's goal is to minimize the absolute number of total errors which will arise from the course of decisions in the long run"); Winter, *The Jury and the Risk of Nonpersuasion*, 5 Law & Soc. Rev. 335, 337 (1971) (preponderance standard results in correct decisions over 50% of the time, while elevated standards "would tend to cause more incorrect decisions than correct ones").

It is thus revealing that, with the exception of defamation cases and a few old equity cases,[18] all such cases have involved "*government-initiated* proceedings that threaten the individual involved with 'a significant deprivation of liberty' or 'stigma.'" *Santosky* v. *Kramer*, 455 U.S. 745, 756 (1982) (citations omitted) (emphasis added). For example, the Court has held that the "clear and convincing" standard applies in proceedings to terminate the "fundamental" and "precious" interest in parental rights, *id.* at 753, 758; in involuntary commitment proceedings, *Addington*, 441 U.S. at 427 (individual's interest is of such "weight and gravity" that higher standard of proof is warranted); in deportation proceedings, *Woodby* v. *INS*, 385 U.S. 276 (1966); and in denaturalization proceedings, *Schneiderman* v. *United States*, 320 U.S. 118, 122, 125 (1943) (citizenship interest is so "precious" as to be "the highest hope of civilized men"). On the other hand, the Court has *declined* to impose the "clear and convincing" standard even in the case of serious governmental impositions such as expatriation and disqualification from a chosen profession.[19]

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[18] It is by now hornbook law that public figure plaintiffs in defamation cases must prove actual malice by clear and convincing evidence. See, *e.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *Rosenbloom* v. *Metromedia Inc.*, 403 U.S. 29, 52-53 (1971) (plurality opinion); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285-286 (1964). Defamation cases are not government-initiated. They are similar to the other cases in which this Court has invoked an elevated standard, however, in that they involve a grave threat to the constitutionally protected interest in free speech.

In the equity cases, the Court imposed the clear and convincing standard on plaintiffs for actions brought to set aside, on the basis of fraud, patents for inventions, see *United States* v. *American Bell Tel. Co.*, 167 U.S. 224 (1897), contracts for sale of land, see *Southern Development Co.* v. *Silva*, 125 U.S. 247 (1888), and land patents, see *Maxwell Land-Grant Case*, 121 U.S. 325 (1887). In these cases, the Court obviously was moved by the special need for stability when dealing with settled property interests.

[19] The Court has held that due process does not require the use of an elevated standard in expatriation cases. *Vance* v. *Terrazas*,

The message of all this jurisprudence is clear: only the gravest deprivations warrant sacrificing the greater accuracy and fairness provided by the preponderance standard. More generally, we reiterate that this Court's rare invocations of the "clear and convincing" standard, whether in a government-initiated proceeding, a defamation action, or an equity proceeding to set aside a written instrument, have *always* been to protect the rights of the *defendant.*[20] *Never has this Court required a defendant to bear a burden of "clear and convincing" evidence.*

In this light, it becomes obvious that it would be entirely anomalous to place on a Title VII *defendant* the burden of disproving the plaintiff's allegations of intentional discrimination by "clear and convincing" evi-

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444 U.S. 252 (1980). Several years prior to *Terrazas*, the Court, in the absence of congressional direction, had invoked the "clear and convincing" standard for expatriation proceedings. The Court did so because it found the consequences of such proceedings to be "drastic." *Nishikawa* v. *Dulles*, 356 U.S. 129, 134 (1958). After *Nishikawa*, Congress specified that the preponderance standard should be used in expatriation proceedings. The Court in *Terrazas* held that due process did not require a higher standard, explaining that "expatriation proceedings are civil in nature and do not threaten a loss of liberty." *Terrazas*, 444 U.S. at 266.

The Court also refused to invoke the "clear and convincing" standard for proceedings to disbar investment advisers under the securities laws. *Steadman* v. *SEC*, 450 U.S. 91 (1981). Even though the defendant in such a proceeding stands to lose his livelihood, the Court found no occasion for departing from the preponderance standard typically employed in civil litigation.

[20] As we noted earlier (see note 14, *supra*), the Court from time to time has permitted an evidentiary burden to shift to the defendant after the plaintiff has established the existence of an improper motive. See *NLRB* v. *Transportation Management Corp.*; *Mt. Healthy City School Dist.* v. *Doyle*. It is notable that in these cases the Court assumed, as if no discussion were needed, that the burden placed on the defendant was the traditional preponderance standard. *Transportation Management*, 462 U.S. at 403; *Mt. Healthy*, 429 U.S. at 287.

dence.[21] It is the Title VII defendant, not the Title VII plaintiff, who is threatened with the stigma of a coercive governmental sanction. It is the Title VII plaintiff, not the Title VII defendant, who seeks the affirmative intervention of the government to reorder the workplace. Any analogy between this situation and cases such as denaturalization and loss of parental rights is obviously misplaced.

We have already explained above (see pages 29-35, *supra*) that shifting the burden of persuasion to the de-

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[21] In her Brief in Opposition (at 12), Hopkins relied on a regulation promulgated by the Equal Employment Opportunity Commission that imposes a burden of "clear and convincing" evidence on federal agency employers in "mixed motives" cases. See 29 C.F.R. § 1613.271. Her reliance is misplaced.

For one thing, this regulation applies only to federal administrative proceedings, not to judicial proceedings involving either federal or private sector employees. Cf. *Bibbs* v. *Block*, 778 F.2d at 1324 n.5 (in federal employee's Title VII action, court expressly rejected the "clear and convincing" standard in favor of the preponderance standard). In federal *administrative* proceedings, the government is of course free to impose a higher burden *upon itself* than Title VII requires, but the EEOC has no authority to establish rules of decision for the federal courts. See *Woodby* v. *INS*, 385 U.S. at 284 (establishing burdens of proof "is the kind of question which has traditionally been left to the judiciary to resolve").

Second, the regulation itself has no power to persuade. In adopting it in 1978, the Civil Service Commission, predecessor to the EEOC, stated only that applying a less elevated standard "is inconsistent with recent court decisions" and that it desired "to bring its administrative process into conformity with the clear intent of the courts." 43 Fed. Reg. 33732 (1978). The only cases invoking the "clear and convincing" test at that time, however, were *Day* v. *Matthews*, 530 F.2d 1083, 1085-1086 (D.C. Cir. 1976), and the Fifth Circuit cases upon which *Day* exclusively relied. The Fifth Circuit is, however, no longer willing to shift the burden to defendants, let alone impose a burden of "clear and convincing" proof. See, *e.g.*, *Jack* v. *Texaco Research Center*, 743 F.2d 1129, 1131 (5th Cir. 1984). Given that the only remaining support for the EEOC regulation is the D.C. Circuit precedent for the very case that is now under review, it makes no sense to ask this Court to defer or give any weight whatever to this regulation.

fendant in Title VII cases itself threatens the achievement of Congress's goal to limit Title VII to cases where discrimination was in fact the cause of an adverse employment decision. That threat would be immensely magnified if the burden on the defendant were raised to a "clear and convincing" standard. The point is vividly illustrated by the facts of this case. Price Waterhouse made a persuasive showing that the failure to promote Hopkins was based on serious deficiencies in her qualifications, not on her sex. It was, precisely, in order to discount that showing that the court of appeals resorted to the "clear and convincing" test as a requirement for the defendant. Here, and in future cases, the effect of that test is to make it virtually impossible for the defendant to rebut the plaintiff's allegations of intentional discrimination. The result will be to hinder, rather than aid, the " 'broad overriding interest shared by employer, employee and consumer' ": the achievement of " 'efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions' " (*Burdine*, 450 U.S. at 259) (citations omitted)).

Radical innovations in the law—such as placing on a defendant the burden of persuasion to disprove an allegation of intentional discrimination, and then requiring that this be done by "clear and convincing" evidence—should come, if at all, from Congress. In the absence of a clear statement by Congress that it wished to create such an inequitable rule, the decision of the court of appeals to impose such a requirement cannot stand.

C. The Court Of Appeals Evaded This Court's Decision In *Burdine* By Improperly Characterizing This Case As One Involving "Mixed Motives."

The court of appeals in this case adopted an approach to the burden of proof issue that makes it virtually impossible for an employer to win a Title VII case, even though there exists overwhelming evidence of a valid, nondiscriminatory reason for the employment decision.

Worse yet, this Draconian approach was applied to a case that should never have been characterized as a "mixed motives" case at all.

The court of appeals did not disturb the district court's findings that, under *Burdine*, would have required a judgment for the defendant: *first*, that Price Waterhouse had established a legitimate, nondiscriminatory explanation for its decision not to make Hopkins a partner; and, *second*, that Hopkins failed to show that this explanation was not the "true reason" for the decision, and, in fact, had not proved that she would have been made a partner even in the absence of "sex stereotyping." Rather, the court ruled that a Title VII violation had occurred solely because some participants in the evaluation process (but not the actual decisionmakers themselves) had engaged in unconscious and unquantifiable "sex stereotyping" and because the firm had not taken steps to eliminate this improper element from the environment.

The court of appeals then evaded *Burdine* by proceeding on this ephemeral basis to characterize the case as one where "mixed motives" were present (and a shift in the burden of persuasion therefore warranted). As we have shown above (at pages 29-36, *supra*), shifting the burdens and standards of proof, even in real "mixed motives" cases, cannot be reconciled with *Burdine*. But, assuming that there exists a category of Title VII cases in which it would be appropriate to shift the burden of persuasion to the defendant, the court of appeals erred in applying its rule to this case, where the only evidence of the existence of "mixed motives" was the presence of an intuitively divined element of sexual stereotyping in the atmosphere, and where there was *no concrete evidence* that *that* element played any causal role at all in the employment decision. Virtually any case can be transformed into one of "mixed motives" on the type of showing made here. Under the court of appeals' ap-

proach, the *Burdine* rule, which unequivocally places the ultimate burden of persuasion in discrimination cases upon the plaintiff, will simply be swallowed up by the "mixed motives" exception, and employers will be deprived of the opportunity fairly to contest Title VII cases based upon the rules adopted by Congress as interpreted by this Court.

"The application of law requires a factual predicate; an action without such a predicate is lawless." Jaffe, *Judicial Review: Question of Fact*, 69 Harv. L. Rev. 1020, 1021 (1956). The necessary factual predicate for bringing the burden-shifting rule into operation must consist of substantial evidence that Price Waterhouse's explanation for failing to promote Hopkins was not the "true reason" for its action (*Burdine*, 450 U.S. at 256). But in this case a series of conjuring tricks was permitted to substitute for substantial evidence. Price Waterhouse's overwhelming evidence that Hopkins was not qualified was discounted, and intentional discrimination found, on the basis of a chain of intuitive hunches about "unconscious" sexism that may have played an "unquantifiable" role in an employment decision—hunches that were arrived at by Dr. Fiske without inquiry into the actual facts that motivated Price Waterhouse's decision. These hunches then were, in turn, magically transformed into evidentiary "facts" by a shift in the burden of persuasion. What was missing was the crucial premise for bringing the "mixed motives" burden of proof rule into play at all: an antecedent finding that there exists in the record as a whole a substantial and objective *basis* for concluding that discriminatory factors played a causal (motivational) role in the decision not to promote Hopkins.

We have already explained why the burden-shifting analysis employed in *Mt. Healthy* and *Transportation Management* should not be applied to Title VII disparate treatment cases. But even assuming that burden-shifting may be appropriate in some Title VII cases, the Court

should in any event require, as a threshold matter, that the plaintiff establish the same substantial factual predicate that supported the claims of unlawful motivation in those cases. In *Transportation Management*, for example, the evidence of the prohibited motive was clear and unequivocal: the discharged employee's supervisor, upon learning of the employee's union organizing activities, referred to him as "two-faced" and "promised to get even with him." 462 U.S. at 396. And in *Mt. Healthy* the school district expressly advised Doyle that its decision not to renew his contract was based at least in part on Doyle's communications with a radio station about an issue of concern to the school district—conduct that this Court held was constitutionally protected. 429 U.S. at 282-284. The evidence of the causal role of unlawful motivation was substantial and objectively ascertainable. Nothing in either *Transportation Management* or *Mt. Healthy* even remotely suggests that the Court would have found "mixed motives" in those cases in the absence of such a predicate.

The evidence in this case stands in stark contrast and vividly illustrates the danger that the court of appeals' "mixed motives" analysis will dissolve *Burdine*'s fundamental rule. Here, the courts below relied almost entirely on the "expert" testimony of Dr. Fiske to support the conclusion that "sex stereotyping" played a significant role in the challenged partnership decision. But Dr. Fiske made no inquiry at all into the concrete facts of Hopkins' performance at Price Waterhouse, facts that were before the Policy Board. She simply isolated some of the language used by Price Waterhouse partners in their written evaluations and labeled the partners' choice of words as "stereotypic thinking." The court of appeals accepted Dr. Fiske's assertion that this conclusion was valid, even though Dr. Fiske had never met Hopkins, had never met any of the partners whose comments about Hopkins she categorically condemned, and knew nothing whatever of Hopkins' *actual* behavior at Price Water-

house. Plainly, this is not substantial, concrete evidence that "stereotyping" even occurred, let alone that it may have played a causal role in the challenged employment decision.

Even strong proponents of sex stereotyping as a theory of liability under Title VII agree that it should give way in the face of "specific instances of unacceptable or undesirable behavior" on the part of the employee—instances showing that the use of supposedly stereotypic words to describe a woman, such as "aggressive," are not stereotypic at all but instead represent the reality of the situation and provide support for the employer's claim that it had a legitimate business reason for rejecting an applicant. See Taub, *Keeping Women in Their Place: Stereotyping* Per Se *as a Form of Employment Discrimination*, 21 B.C.L. Rev. 345, 395-397 (1980). Here, the only plausible conclusion that can be drawn from the record as a whole is that the partners' chosen words, far from reflecting supposedly stereotypic thinking, accurately described "specific instances" of unacceptable and undesirable behavior. For example, Hopkins' most ardent supporter, Thomas Beyer, testified that he had heard complaints about her relations with staff "almost from the day [Beyer] joined the Office of Government Services in 1979." Tr. 163-164. One of the St. Louis partners supported his evaluation by noting that Hopkins' management style of "using 'trial & error techniques' * * * *caused a complete alienation of the staff towards Ann & a fear that they would have to work with Ann if we won the project.*" Def. Exh. 27 (emphasis added). Moreover, the record is replete with particularized examples of Hopkins' difficult relations with staff, ranging from the "vitriolic" attack she launched on various OGS staff members (see page 8, *supra*), to her screaming obscenities at a consultant for 45 minutes (Tr. 193). Surely this provided more than ample support for suggesting that she would benefit from "a course at charm school," that she could "be abrasive, unduly

harsh, difficult to work with &, as a result, cause[d] significant turmoil," and that, as the Policy Board ultimately concluded, she needed to develop "social grace" before becoming a partner at Price Waterhouse (Def. Exh. 38). Had Dr. Fiske taken the trouble to investigate the factual foundation of the comments she categorically condemned as stereotypic, she would have been forced to acknowledge that they were supported by "specific instances of unacceptable or undesirable behavior" (Taub, *supra*, 21 B.C.L. Rev. at 395).

Significantly, unlike Dr. Fiske, the Admissions Committee at Price Waterhouse *did* investigate the factual bases of the negative comments about Hopkins (as well as those made about other candidates) by making personal visits to partners who had filled out evaluation forms in order to get a better understanding of the actual reasons for the partners' recommendations. See, *e.g.*, Tr. 244-245, 254-257, 560-561. Thus, the Admissions Committee made its recommendation to the Policy Board not simply on the basis of the supposedly stereotypic remarks reflected in the partners' written comments, but on the basis of personal interviews that brought out the underlying facts.[22]

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[22] In fact, Dr. Fiske admitted that "external" explanations for the comments about Hopkins *may* have existed; yet she insisted that she could characterize the process as tainted without investigating whether or not they *did* exist. Here is an exchange between the district judge and Dr. Fiske (J.A. 34):

> THE COURT: Well, now take a partner who is supervising the plaintiff. And she asks for his advice and he gives it to her. And she comes back * * *. She tells him that his advice was stupid. And she busts into his room without knocking when the door is closed, frequently. * * *
>
> Now, what are you trying to tell me about that, that under those facts his vote should not be counted or that he is discriminating sexually?
>
> THE WITNESS: No, I am not trying to say that. * * * Any given incident like that frequently has an external explanation * * *.

Furthermore, Dr. Fiske's testimony—even assuming it correctly categorized particular comments as stereotypic—provided no basis for a finding that stereotyping had an impact upon the Policy Board's decision to place Hopkins' partnership candidacy on hold. In fact, nothing in the record supports the conclusion that the Policy Board based its decision on anything other than the objective facts that *all* the evaluations, whether or not stereotypical, recounted about Hopkins. And, as Judge Williams demonstrated in his dissent (Pet. App. 30a-36a), the handful of statements upon which Dr. Fiske relied for her "stereotyping" conclusion were, virtually without exception, either (1) made by Hopkins' *supporters* and therefore were unlikely to have adversely affected her partnership candidacy, or (2) made at a remote time and about other women who *did* become partners, or (3) made by persons outside the decision-making chain, so that no adverse effect on Hopkins could have occurred, and/or (4) made in a fashion so that the implications of the statements were either utterly benign or, at worst, ambiguous, requiring a healthy imagination to assign illicit motivation to them. At the most, therefore, these comments might conceivably be taken as indicating that stereoypical thinking was sometimes present "in the air" at Price Waterhouse—not as evidence of discrimination in the *particular* decision to hold Hopkins' partnership bid (see Pet. App. 30a) (Williams, J., dissenting).

In sum, Dr. Fiske's testimony could provide no evidence of any relevance whatever to a determination whether there existed a causal relationship between the allegedly stereotypical aspect of the remarks she relied on and the Policy Board's decision. Neither Dr. Fiske's testimony, nor any other evidence presented in this case, could reasonably support a finding that any single member of the Policy Board—let alone a majority of the Board's members—was influenced by the stereotypical rhetoric (if such it was) in which a very few partners

couched their remarks, rather than by the *facts* about Hopkins' behavior that so evidently underlay both those remarks and the many others before the Board—remarks made in evaluations of Hopkins' performance over the years as well as during the partnership evaluation process.

Even if the Court should someday hold that there are circumstances that justify a shifting of the burden of persuasion to the defendant in a Title VII case, no such circumstances existed here. If this case can be characterized as one involving "mixed motives," then virtually any other Title VII case could be so labeled, and the *Burdine* principle—squarely placing the burden on the plaintiff to prove discriminatory employment action—will simply disappear in a sea of findings of "mixed motives" that are totally lacking in concrete evidentiary support.[23] At a minimum, the Court should rule that a case may not be characterized as a "mixed motives" case for the purpose of placing the burden of persuasion on the defendant unless the trial court first finds that there is a substantial, concrete basis in the record to support the proposition that the legitimate reason for the employment decision established by the employer was a pretext under *Burdine*—that is, that it was not the "true reason" for the decision. When this standard is applied here, the conclusion is inescapable that the court of appeals improperly held that the burden of persuasion shifted to Price Waterhouse; and, accordingly, its judgment must be reversed.

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[23] The Court may find a possible analogy here to the history and role of the "substantial evidence on the whole record" rule in administrative law, which derived from congressional dissatisfaction with the perceived tendency of some agencies to substitute expert intuitions, based on bits and pieces of evidence, for a fair appraisal of the evidence as a whole. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), and the discussion in Jaffe, *supra*, 69 Harv. L. Rev. 1020.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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